Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JAY MONTOYA,

Petitioner,

v.

ARIZONA DEPARTMENT OF TRANSPORTATION;
ARIZONA STATE PERSONNEL BOARD,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court of the State of Arizona

PETITION FOR WRIT OF CERTIORARI

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93pp

QUESTION PRESENTED

Montoya's supervisor emailed a complaint on him. He was suspended for 2 weeks without pay. After suspension, the division manager (O'Neill) reprimanded him based on the same email; falsely stating it was based on his discussion with Macier. Montoya filed a grievance against O'Neill's action and demanded Macier's testimony. O'Neill unilaterally assumed direct supervision over Montoya and conducted the hearing. Montoya filed for a Step 2 review from O'Neill's supervisor, Peters. Peters requested extra time to respond. Montoya agreed. O'Neill unilaterally terminated the grievance, expunged Montoya's response, demanded a second response within 2 ½ days, and dismissed Montoya for failing to respond. At the post-dismissal hearing Macier testified he never spoke to O'Neill. Montoya brought a due process claim under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) and Arizona Administrative Code R2-5-803(A).

The decision below held A.A.C. 2-5-803(A) (i.e., "employee's response shall be made not later than 3 working days") was not abridged by the 2 ½ day demand, and *Loudermill* was not abridged since Montoya did not show 2 ½ days caused prejudice.

The question presented is: Whether the decision rejecting the due process claim to 3 days to file a predismissal response conflicts with this Court's decisions in *Loudermill* and *Board of Regents v. Roth*, 408 U.S. 564 (1972).

PARTIES

The petitioner, Jay Montoya, has appeared pro se in every court, after having a union representative's assistance during the initial administrative proceeding before the respondent Arizona State Personnel Board (Board). The only two other parties in these proceedings have been the respondent Arizona Department of Transportation and the respondent Board.

The petitioner's timely motion of February 22, 1999 (pursuant 42 U.S.C.A. 1985 and 1986) to add Mary Peters (Deputy Directory, ADOT), Jerald Moreland (Personnel Director, ADOT), Joseph O'Neill (Manager, Equipment Services Division, ADOT), and John Sokol (Attorney, Arizona State Attorney General's Office) as defendant-conspirators in O'Neill's February 23, 1998 perjury –upon which evidence concerning a September 2, 1997 email was entered as a post-dismissal basis to sustain the petitioner's dismissal- was denied by the Maricopa County Superior Court on March 30, 1999.

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PETITION FOR A WRIT OF CERTIORARI

Montoya respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Arizona entered in the above entitled proceeding on July 25, 2000.

OPINIONS BELOW

The order of the Supreme Court of the State of Arizona, CV-00-0083-PR (July 25, 2000), is printed in the Appendix, *infra* at App. 1. The order of the Court of Appeals State of Arizona Division One, 1 CA-CV-99-0403 (February 8, 2000), is printed in the Appendix, *infra* at App. 2. The order of the Arizona Superior Court for Maricopa County, CV 98-17741 (June 18, 1999), is printed in the Appendix, *infra* at App. 12. The order of the respondent Arizona State Personnel Board is printed in the Appendix, *infra* at App. 19. The grievance decisions and responses are printed in the Appendix, *infra* at App. 58.

JURISDICTION

The Supreme Court of Arizona entered its judgment on July 25, 2000 (App., infra, App. 1). The jurisdiction of this Court is invoked under 28 U.S.C.S. 1257.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

CONSTITUTION OF THE UNITED STATES, AMENDMENT V:

No person shall . . . be deprived of life, liberty, or property, without due process of law.

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV :

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code Ann., Chapter 42, Section 1985(3):

If two or more persons in any State or Territory conspire … for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws …; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

United States Code Ann., Chapter 42, Section 1986:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or legal representatives, for all damages caused by such wrongful act, which such persons guilty of such wrongful neglect or refusal may be joined as defendants in the action[.] ... But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

ARIZONA ADMINISTRATIVE CODE
Section R2-5-803(A)

Pre-dismissal procedures. Before an employee with permanent status can be dismissed, the agency head shall give the employee written notice of the charges, a summary of the agency head's basis for the charges, and an opportunity for the employee to present a written response. The employee's response shall be made not later than 3 working days after the employee receives notice of the charges, unless extended in writing by the agency head.

STATEMENT

Montoya was a full-time permanent status tenured employee of the respondent ADOT. He began working for ADOT in December 1990. On December 9,

1996 he filed a Complaint of Discrimination in the local federal district court naming ADOT and several ADOT employees, including the Director of the agency, as defendants. (App., *infra*, 21, 37-38, 47, 58.)

Montoya and ADOT entered a mediated agreement on June 5, 1997, agreeing to transfer him to another agency by August 4, 1997; if not done accordingly, ADOT could transfer him to another section within ADOT, but "ADOT will continue its effort to effect Mr. Montoya's transfer to another state agency on a continuous basis." (App., *infra*, 23, 37-38, 40.)

ADOT transferred Montoya from the Administrative Services Division to the Equipment Services Division on August 27, 1997. On September 2, 1997, Montoya's new supervisor, Mary Ann Pikulas, emailed the ADOT Personnel Director, Jerald Moreland, and her supervisor, Joseph O'Neill, that an unnamed subordinate employee said Montoya's presence caused her concern for her safey. (App., *infra*, 6, 24, 25, 39, 46; also 42, 44.)

Moreland responded by placing Montoya on administrative leave with pay on September 5, 1997. (App., *infra*, 22). O'Neill terminated the administrative leave and suspended Montoya without pay commencing September 26, 1997. (App., *infra*, 25, 36, 38, 39, 58.) Extensive hearings on the charges generated from the September 2 email were held.

Montoya returned to work from suspension on October 14, 1997, and was immediately given a written reprimand by O'Neill on the basis of the same September 2 email upon which his administrative leave

with pay and suspension without pay were based. (App., *infra*, 22, 26-28; also 14.)

Montoya filed a grievance on October 24, 1997 with Pikulas. O'Neill advised Montoya he was unilaterally and immediately assuming direct supervision over Montoya. O'Neill conducted the Step 1 written grievance hearing with Montoya, to which Montoya filed his response. Montoya filed for a Step 2 review with O'Neill's supervisor, Mary Peters. On November 12, 1997, Peters requested extra time to respond to the grievance. Montoya agreed to allow Peters the extra time. (App., *infra*, 58-64.)

The respondent Board's hearing officer, who reviewed Montoya's administrative appeal of his suspension, upheld Montoya's objection on November 13, 1997; and denied John Sokol's attempt (ADOT's attorney) to enter the facts underlying the October 14, 1997 reprimand into Montoya's suspension hearing. (App., *infra*, 40, 57.)

Thereafter, on November 18, O'Neill (who was Peters' subordinate) unilaterally terminated the grievance process, expunged Montoya's written complaint and grievance responses, and issued a pre-dismissal warning advising Montoya he only had 2 ½ days file another response. (App., *infra*, 65-69.) On November 24, 1997, O'Neill dismissed Montoya from employment, stating the reason for the decision was Montoya's failure to respond within the time required pursuant the November 18 pre-dismissal notice. (App., *infra*, 71.)

At the post dismissal hearing before the respondent Board's hearing officer, Montoya's representative objected to raising the facts from the

September 2 email as a basis for Montoya's dismissal on the grounds that: (1) Montoya had already served a two-week suspension without pay on the basis of the email; (2) O'Neill's actions violated 41 A.R.S. 770 (i.e., a list of causes for dismissing a tenured employee); (3) O'Neill's actions violated the ruling in *Loudermill*; and, (4) O'Neill's actions violated the Arizona attorney general's opinion on 41 A.R.S. 770. (App., *infra*, 26-27, 36; also pages 3-16 of the post-dismissal hearing transcript.)

The hearing officer judicially noticed that O'Neill would be presumed to of acted legally and with the proper incentive and that O'Neill's credibility would be based solely upon testimony on the September 2 email. (App., *infra*, 6-7, 14-15, 29, 31; also pages 77 and 145 of the post-dismissal hearing transcript.) This was notwithstanding the fact that O'Neill testified he decided to dismiss Montoya rather than to simply reprimand him on the basis of his discussion with James Macier. Testimony from Macier, James Kimes, Jay Montoya and the documented evidence proved O'Neill's testimony was perjury. (App., *infra*, 33-34, 42, 52-53, 54.)

Montoya filed his objections to the Board on July 8, 1998, stating his dismissal was improper because ADOT (via O'Neill) had failed to give him five days to respond to the November 18 pre-dismissal notice pursuant his grievance rights (App., *infra*, 35-37, 47-51).

The Board upheld Montoya's dismissal (App., *infra*, 19), so Montoya filed an Opening Brief on February 22, 1999. He motioned for an order to add four defendants to the case under 42 U.S.C.A. 1985(3) and 1986. The court denied the motion for the reason

that the defendants were not necessary for the disposition of the administrative claim. Montoya placed before the Maricopa County Superior Court the issue that his constitutional right to file a pre-dismissal response was violated by O'Neill's ad hoc unilateral decision to dismiss him for failing to file a response within 2 ½ days of the November 18 pre-dismissal notice.

Montoya's appeal to the Superior Court (and later the Court of Appeals and the Arizona Supreme Court) produced extensive documented evidence, substantiated by O'Neill's own testimony as well as that from other witnesses, that proved O'Neill had lied and committed perjury in explaining why he chose to dismiss Montoya for failing to file a response within 2 ½ days. The Superior Court held although other inferences could be made, its scope of review did not allow it to do so. (App., *infra*, 13-16.) The Court of Appeals held:

> "Montoya also claims that his dismissal is unsupported because O'Neill misidentified the source of his information as being Macier or Henry, rather than Pikulas. Assuming that to be the case, the dismissal remains well supported by the evidence adduced at the [post-dismissal] hearing. The issue before this court, is not O'Neill's credibility; rather, it is whether the body of evidence at the [post-dismissal] hearing supported [O'Neill's] termination of Montoya's employment." (App., *infra*, 6.)

The respondent ADOT, on March 25, 1999, raised for the first time the argument that O'Neill had a right to demand a response within 3 days under A.A.C.

R2-5-803(A). (Exhibit J of the Answering Brief filed with Maricopa County Superior Court.) Montoya replied on April 12, 1999 that he was not even given the full three days granted under the code cited by ADOT. The Maricopa County Superior Court held:

> "The regulation is written in limiting terms telling the employee that the employee has no more than three days. In this case, if the Court does not count the date of delivery of the notice, the three working days would be Wednesday, November 19, 1997; Thursday, November 20, 1997; and Friday, November 21, 1997. The Plaintiff's working days concluded at 3:00 p.m., although at the time of the letter, Plaintiff was not working, but was on administrative leave. One could argue that the ADOT business working day would not conclude until 5:00 p.m.. Therefore, the area of concern is whether it was appropriate for [O'Neill] to condition the response to the pre-termination letter at noon on the third working day.
>
> Although it would have been better for [O'Neill] to have allowed to the end of the third working day, the Court does not think the difference between three hours to 3:00 p.m., or five hours to 5: p.m. to be significant in this case, and certainly not significant enough to rise to the level of a due process violation." (App., *infra*, 16.)

Montoya filed his Petition for Review with the Supreme Court of Arizona on March 8, 2000, and complained before that court (as he did before the

Superior Court and the Court of Appeals previously) that his due process rights were violated in that he was not given the full 3 days to file a pre-dismissal response, and that the testimony on the September 2 email was entered solely on the basis of O'Neill's perjury that he had discussed the matter with Macier. A panel of three from that Court, on July 24, 2000, denied the Petition for Review without comment.

REASONS FOR GRANTING THE WRIT

A Writ of Certiorari should issue to review the judgment of the Supreme Court of Arizona entered on July 24, 2000 in *Jay Montoya vs. ADOT/AZ State Personnel Board*, CV-00-0083-PR (2000). That decision denied Montoya relief under his claim that his constitutional due process right to have 3 days to file a pre-dismissal response under A.A.C. R2-5-803(A) had been violated. He substantiated that claim by proving judicial notice was improperly given to O'Neill's perjury. O'Neill testified at the post-dismissal hearing that he gave Montoya only 2 ½ days to file a response on the basis of O'Neill's fictitious discussion with Macier in October 1997.

This case peculiarly provides the explicit set of facts, record of evidence and error, and exactly the scenario requisite to review Justice Rehnquist's admonition in the *Loudermill* decision (when he cited to *Board of Regents v. Roth*) that a state may implement due process procedures controlling the pre-dismissal response rights to be provided to state government employees.

The actions and credibility of O'Neill are pivotal in sanctioning the necessity for both the employee and the employer to follow the state's administrative code controlling pre-dismissal response rights. O'Neill's **"credibility"** in explaining why he did not follow the administrative code was directly placed at issue by Montoya at every stage in every proceeding below. It is appropriate for the United States Supreme Court to hold that where a state code establishes the time period that a state employee must follow in filing a pre-dismissal response, then that same code provides a privilege, an immunity and a right for the employee to not face dismissal for the reason that he failed to file in less time than provided under the code.

The code gave Montoya up to 3 days to file a response to a pre-dismissal notice before he could be dismissed. There was no evidence entered by either of the Respondents, whatsoever, to explain why Montoya should not have been given the full 3 days designated by the code. The onus should not be, as held by the Court of Appeals, on Montoya to show why O'Neill's act in not following the code was prejudicial. It was an error for the post-dismissal hearing officer to judicially notice O'Neill was presumed to of acted legally and with the proper incentive, and for the Appeals Court to follow up with a holding that O'Neill's credibility was not an issue. An established legal filing period should carry with it sanctions only when the employee does not file within the period required. Montoya's Opening Brief in the Superior Court argued he was preparing his response when he received the expedited dismissal document, which was ignored by the Court of Appeals (App., *infra*, 9). Prejudice pervades any legal system

that parades through written code a right, a privilege, an immunity for an employee not to face dismissal so that he may file a pre-dismissal response up to 3 days after receipt of a pre-dismissal notice; and then allows a person whom the employee filed a grievance against the power to unilaterally terminate the grievance and then to dismiss the employee for failing to file a response within 2 ½ days.

Montoya set forth and used the record to clearly prove perjury was evident in the purported reason given by O'Neill for terminating his grievance and in dismissing him for failing to make the expeditious response. Neither of the Respondents, nor their counsel, entered any evidence whatsoever, or even sought to explain or justify O'Neill's action in not following the code. They did not have to because the post-dismissal hearing officer judicially noticed O'Neill was presumed to of acted legally and with the proper incentive.

Absent any explanation other than perjury (and judicial notice allowing the perjury) as to why O'Neill decided not to follow the code, there was never any authority established to allow the post-dismissal hearing officer to enter the evidence concerning the September 2 email concerning the driving infraction; and then to uphold the dismissal on the basis of evidence that was proven never to have been before O'Neill when he decided to expedite Montoya's dismissal. O'Neill committed perjury in stating he made his decision upon reviewing testimony he received from Macier and another employee. It was proven he did not receive this testimony; yet it was on this testimony that the post-dismissal hearing officer

upheld the dismissal, and the Court of Appeals followed with a holding that O'Neill's credibility was not an issue.

It was arbitrary, capricious and an erroneous use of judicial authority to hold that Montoya must prove prejudice, in addition to his proof that O'Neill committed perjury, in order to have equal protection and privilege under the pre-dismissal procedure of A.A.C. R2-5-803(A). The November 24, 1997 dismissal notice explicitly stated the reason for pursuing dismissal was Montoya's failure to respond within the time demanded (App., *infra*, 71). O'Neill's committed perjury by claiming the expedited dismissal process was based on his discussion with James Macier. There was no discussion, therefore Montoya directly linked O'Neill's lack of credibility to his decision to deprive Montoya of his constitutional right to have three days to file a pre-dismissal response pursuant Amendments 5 and 14 of the United States Constitution, 42 U.S.C.A. sections 1985(3) and 1986, A.A.C. Section R2-5-803(A), and the *Loudermill* and *Roth* decisions.

The proper post-dismissal procedure is to determine whether there was sufficient evidence to support O'Neill's decision to unilaterally terminate Montoya's grievance and to dismiss him for failing to file a response in less time than provided by A.A.C. R2-5-803(A). O'Neill's failure to follow the code placed the post-dismissal hearing officer's judicial notice of O'Neill's presumed legal act and proper incentive in direct conflict with this Court's decision in *Loudermill* and *Roth* to file a pre-dismissal response.

It was a reversible error for the Appeals Court to hold O'Neill's credibility was not at issue. The

testimony concerning the September 2 email was first raised during Montoya's suspension hearing; when John Sokol (ADOT's attorney) obtained it from Jerald Moreland's (ADOT's Direct of Personnel) testimony. The record established O'Neill first heard the testimony at the post-dismissal hearing; after he dismissed Montoya for failing to respond within 2 ½ days. Therefore it was improper to enter the testimony on the September 2 email because it was not before O'Neill before he made his decision to dismiss Montoya, even though O'Neill's judicially noticed perjured testimony averred that it was.

Montoya demanded nothing more than what the Arizona Administrative Code requires; that he be given 3 days to file a response to a pre-dismissal notice before he is dismissed. This issue is solely and succinctly placed before the Supreme Court of the United States: Where a state confers the constitutional property right of employment upon a tenured public employee, and where the state's administrative code establishes the duration and tenure of that right, then the state may not single any employee out and deprive that single individual of the same tenure rights that are given to every other state employee. It was a constitutional error to deprive Montoya of the same privilege and immunity presumably enjoyed by any and every other employee covered under A.A.C. R2-5-803(A).

CONCLUSION

For the forgoing reasons, the petition for writ of certiorari should be granted, and this Court should

vacate the decisions of the courts below and remand for further consideration in light of Amendment Five and Amendment Fourteen of the United States Constitution, this Court's *Loudermill* and *Cleveland Board of Educ. V. Roth* decisions, A.A.C. R2-5-803(A), and Montoya's timely February 22, 1999 filing of his 42 U.S.C.A. Section 1985 and 1986 action.

Respectfully submitted
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APPENDIX

SUPREME COURT
STATE OF ARIZONA

July 25, 2000

RE: JAY MONTOYA vs ADOT/AZ STATE PERSONNEL BOARD
Arizona Supreme Court No. CV-00-0083-PR
Court of Appeals Division One No. 1 CA-CV 99-0403
Maricopa County Superior Court No. CV 98-17741

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on July 24, 2000, in regard to the above-referenced cause:

ORDERED: Motion to Supplement Citation of Legal Authority = DENIED.
FURTHER ORDERED: Petition for Review = DENIED.

A panel composed of Vice Chief Justice Jones, Justice Feldman, and Justice Martone participated in the determination of this matter.

Record returned to Court of Appeals, Division One, Phoenix, this 25th day of July, 2000.
Noel K. Dessaint, Clerk

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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1 CA-CV 99-0403
DEPARTMENT D

JAY MONTOYA,

Plaintiff-Appellant,

Versus

ARIZONA DEPARTMENT OF TRANSPORTATION;
ARIZONA STATE PERSONNEL BOARD,

Defendants-Appellants.

ORDER

This matter was submitted to the Court, and the Court has this day rendered its Memorandum Decision.

IT IS ORDERED that the Memorandum Decision be filed by the Clerk.

IT IS FURTHER ORDERED that a copy of this order, together with a copy of the Memorandum Decision, be sent to each party appearing herein or to the attorney for such party, and to the Honorable Johathan H. Schwartz.

DATED this 8th day of February, 2000.

/s/ Cecil B. Patterson, Jr.
Cecil B. Patterson, Jr., Judge

App. 3

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

1 CA-CV 99-0403
DEPARTMENT D
(Filed February 8, 2000 By Glen D. Clark, Clerk)

JAY MONTOYA,

Plaintiff-Appellant,

Versus

ARIZONA DEPARTMENT OF TRANSPORTATION;
ARIZONA STATE PERSONNEL BOARD,

Defendants-Appellants.

MEMORANDUM DECISION (Not for publication; Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court of Maricopa County
Cause No. CV 98-17741
The Honorable Jonathan H. Schwartz, Judge
AFFIRMED

PATTERSON, Judge

The Arizona Department of Transportation (ADOT) terminated Jay Montoya's employment for cause. Montoya appeals from the superior court's affirmance of ADOT's decision to terminate his employment. We affirm.

FACTS AND BACKGROUND

Montoya worked full time for ADOT as a Fiscal Services Specialist 1. ADOT dismissed Montoya on the basis of two incidents, one in which Montoya drove his car at two co-workers in an ADOT facility parking garage in an apparent attempt to run them down, and another in which Montoya clenched his fists and yelled at his supervisor, "You are a liar! You are a liar!"

Montoya appealed the decision to the State Personnel Board under Arizona Revised Statutes Annotated (A.R.S.) section 41-785(A)(1999). After an evidentiary hearing, a hearing officer recommended that Montoya's dismissal be upheld. The State Personnel Board rejected Montoya's objections to the hearing officer's factual and legal conclusions, and adopted the hearing officer's recommendation that the dismissal be upheld. Montoya appealed the dismissal to the superior court, which determined that the underlying allegations were factually supported, found no legal error, affirmed the dismissal, and entered judgment for ADOT and the State Personnel Board. Montoya timely appealed the superior court's decision to this court. We have jurisdiction under A.R.S. section 12-2101(B)(Supp. 1999).

DISCUSSION

In an appeal to the superior court from an administrative proceeding, the superior court must uphold the administrative body's decision unless it lacks any reasonable evidence to support it. *See* A.R.S. 41-785(F)(2); *Evans v. State ex rel. Arizona Corp.*

Comm'n, 131 Ariz. 569, 573, 643 P.2d. 14, 18 (App. 1982). In an appeal to this court from the superior court, we also determine whether the administrative record contains evidence to support the dismissal. *See* A.R.S. 41-785(G) (providing that appeal to this court shall be available pursuant to the Administrative Review Act, A.R.S. 12-901 to 12-914); *Carondelet Health Services v. Arizona Health Care Cost Containment Sys. Admin.*, 182 Ariz. 5802, 504, 897 P.2d 1388, 1390 (App. 1995) ("In appeals taken under the Administrative Review Act, A.R.S. 12-901 to 12-914, neither the superior court nor the court of appeals weighs the evidence; rather in reviewing factual determinations, the role of either court is only to determine whether there was substantial evidence to support the administrative dection").

Sufficiency of the Evidence

Montoya contends that the evidence adduced at the hearing was insufficient to support the decision to terminate his employment.

Joseph O'Neill, the administrator of the ADOT department where Montoya was working, dismissed Montoya on two grounds: the first being Montoya's attempt to run down co-workers James Macier and Carol Henry on August 27, 1997; the second, an incident occurring on October 31, 1997, in which Montoya clenched his fists and screamed at O'Neill, "You are a liar! You are a liar!"

O'Neill issued a "memorandum of concern" on October 14, 1997, summarizing the parking lot incident.

O'Neill rescinded the memorandum of concern on November 18, 1997. At the hearing, ADOT's counsel asked O'Neill why he rescinded the memorandum of concern and Montoya's representative objected, arguing the rescission letter "speaks for itself." Actually, O'Neill already had testified why he rescinded the memorandum of concern, explaining that after he issued the memorandum he reconsidered the seriousness of the incident and concluded that it warranted a dismissal. In ruling on the objection, the hearing officer stated:

> He's [O'Neill] acting in his official capacity. We'll take judicial notice that he's working as a state employee. He's presumed to be following the law and proper incentive. Therefore, so stipulated by the hearing officer, if it's not (inaudible). We don't need to know. It's an established fact.

Montoya assigns error based on the foregoing statement. He argues that the "only evidence cited was judicial notice that O'Neill was presumed to be acting legally and with the proper incentive." Montoya asserts that there is no competent evidence concerning the basis for the August 27 parking lot incident because O'Neill received his information from Montoya's immediate supervisor, Mary Ann Pikulas, rather than directly from Macier and Henry. He refers to the hearing officer's quoted ruling as judicial notice of "perjury" and "fiction".

First, the scope of the judicially noticed fact seems much narrower than what Montoya presumes.

Admittedly, the hearing officer did not make a precise statement explaining the meaning of his ruling. However, the most reasonable interpretation is that the hearing officer was taking judicial notice that O'Neill was acting in his capacity as the Equipment Services Administrator when he dismissed Montoya from ADOT's employ.

The ruling, even if improper, would not establish a lack of evidence regarding either basis for Montoya's dismissal. The judicial notice, such as it was, is not the only evidence on record. Both Macier and Henry testified at the hearing that Montoya intentionally drove his car toward them at an excessive speed, causing them to jump out of his path in order to avoid being injured. That testimony fully supports the hearing officer's finding that the dismissal was justified.

With respect to the October 31 incident, O'Neill had direct personal knowledge, and his testimony supports the allegation. Again, this testimony alone is sufficient to support the hearing officer's finding.

The Macier and Henry testimony regarding the parking lot incident is substantial evidence. Likewise, O'Neill's testimony concerning the October 31 incident is substantial evidence. Accordingly, we reject Montoya's third assignment of error, i.e., that the superior court erroneously failed to require substantial evidence, rather than any evidence, in support of ADOT's decision to dismiss Montoya. In contrast to Montoya's assertions, "any reasonable evidence"

satisfies the review standard. *Johns v. Arizona Dept. of Econ. Sec.*, 169 Ariz. 75, 78, 817 P.2d 20, 23 (App. 1991).

Montoya also claims that ADOT violated his federal constitutional due process rights by affording him insufficient time to respond to the allegations of misconduct. He bases this argument on the fact that O'Neill gave him less than three working days to respond to the pre-termination notice dated November 18, 1997.

Section R2-5-803(A) of the Arizona Administrative Code (A.A.C.) states:

> Before an employee with permanent status can be dismissed, the agency head shall give the employee written notice of the charges, a summary of the agency head's basis for the charges, and an opportunity for the employee to present a written response. The employee's response shall be made not later than 3 working days after the employee receives notice of the charges, unless extended in writing by the agency head.

Here, the pre-termination notice in question is the amended November 18 notice referencing the two incidents described above. O'Neill issued an earlier pre-termination notice dated November 6, 1997, based solely on the October 31 incident in O'Neill's office. Montoya filed a timely response to the November 6 notice. Thus, Montoya's notice argument goes only to the dismissal based on the parking lot incident.

Montoya received the amended November 18

notice of dismissal on the same day, apparently in the afternoon or evening. If his response deadline was November 21 at noon, he did not have the full three days contemplated in the above-quoted administrative provision. However, the A.A.C.'s language appears to give an employee *up to* three days to respond. Thus, the deadline in this case seemingly imposes limits on the amount of time Montoya has to respond; rather than a constraint on O'Neill's decision to dismiss.

Montoya did not, nor attempt to, respond to the November 18 notice. O'Neill then terminated Montoya's employment on November 24. Montoya appealed that decision and an administrative hearing officer conducted an evidentiary hearing on June 23, 1998. The hearing officer recommended that ADOT uphold O'Neill's decision to dismiss Montoya from employment.

The hearing officer considered Montoya's claim that he should have been given more time to respond, and concluded that the time period was adequate under the circumstances. We agree that the notice here was adequate given: (1) the October 14 memorandum of concern arising out of the parking lot incident; (2) the considerable discussion and correspondence between O'Neill and Montoya regarding the incident; and (3) the fact that Montoya did not even attempt to deliver a response at any time before O'Neill actually dismissed him on November 24.

A minor abbreviation of the three-day period referenced in the A.A.C. has no constitutional

implications. Montoya relies principally on *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), to support his claim that ADOT violated his due process rights.

This court applied *Loudermill* to a similar claim in Johns, 169 Ariz. At 79, 817 P.2d at 24, and concluded that due process is satisfied where, as here, the employee receives notice of the reasons for the dismissal and a reasonable opportunity to dispute them prior to termination. As we stated in *Williams v. Pima County*, 164 Ariz. 170, 174, 791 P.2d 1053, 1057 (App. 1989), "all *Loudermill* requires is an opportunity for an employee to give his side of the story before his employer reaches the decision to fire him." Montoya had that opportunity, and took advantage of it in the grievance he filed on October 14 – more than a month before the November 18 pre-termination notice was issued. The hearing officer heard Montoya's side of the story and disbelieved it. More importantly, O'Neill – the person who made the decision to dismiss Montoya – heard Montoya's side of the story and rejected it *before* making the decision to dismiss him. The response period of November 18 through 21 was effectively a chance for Montoya to retell his side of the story, and he made no attempt to do so.

We have no record of what other evidence Montoya could have produced for O'Neill that would have altered the decision to dismiss him. Montoya fails to identify any prejudice that resulted from the abbreviated response period, and offers no insight as to

how he would have responded differently if he had been given the balance of the afternoon of November 21. His failure to identify any prejudice defeats his due process claim. Brown v. Arizona Dep't. of Real Estate, 181 Ariz. 320, 324, 890 P.2d 615, 619 (App. 1995).

Accordingly, we find that due process was satisfied.

CONCLUSION

Montoya has demonstrated neither a deficiency of evidence nor constitutional error. The judgment of the superior court is affirmed.

/s/ Cecil b. Patterson Jr.
Cecil B. Patterson, Jr. Judge

CONCURRING:

/s/ Jefferson L. Lankford
Jefferson L. Lankford
Presiding Judge, Department D

/s/ Sheldon H. Weisberg
Sheldon H. Weisberg, Judge

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Arizona State Personnel Board

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA COUNTY
No. CV 98-17741

JAY MONTOYA,
Plaintiff,
vs.
ARIZONA DEPARTMENT OF TRANSPORTATION,
Respondent.

ORDER AND JUDGMENT

The Court having reviewed this matter and having heard argument on the same, the Court makes the following findings:

The Plaintiff/Appellant's due process rights were not violated and the Plaintiff had sufficient time pursuant to Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 14871 84 L.Ed.2d 494 (1985), to respond to the pretermination letter of November 18, 1997.

The record before the hearing officer in this matter contains sufficient information to uphold the dismissal. Co-employees were afraid of the Defendant for having driven his car in a grossly negligent manner in the parking lot. The employees did not simply relate an incident where the Defendant negligently failed to see them when backing out of a parking space, but instead clearly described the fact that the backing out of the parking space was careful enough, but the Defendant drove directly at them at a high rate of speed as if he were going to hit them. This conduct rises to the level of action that justifies dismissal.

In addition, the record below contained evidence from Joseph O'Neill, a supervisor of the Plaintiff/Appellant, that the Plaintiff had engaged in inappropriate behavior on October 31, 1997 in the supervisor's office by calling the supervisor a liar and then screaming those words at the supervisor when told to stop acting in that manner.

The two incidents together when considered in the context of prior disciplinary action against the Defendant constitutes sufficient grounds for dismissal. Therefore, the decision of the Personnel Board and ADOT was based on some evidence in the record.

This Court engages in a limited scope of review. This Court does not find that other inferences could not be made from the record. The record does contain information from which a person could infer that dismissal was inappropriate. This Court will not substitute its own judgment for the judgment of ADOT

and the Personnel Board because that is an inappropriate standard of review. This record is replete with sufficient information from which the trier of fact at the administrative agency, as well as the Personnel Board and the agency itself, ADOT, could appropriately justify a dismissal of the Plaintiff/Appellant.

The fact that the August 21, 1997 driving in the parking lot incident was not brought to the attention of the Plaintiff until approximately October 13, 1997 does not in and of itself lead to the conclusion that it was not grounds for dismissal. In the November 6, 1997 first letter of pre-termination issued by ADOT, Joseph O'Neill did not list the driving incident as the reason for the dismissal, but listed it as another area of consideration in the second page of the letter.

The Plaintiff responded to the November 6, 1997 letter on approximately November 10, 1997, within the five working days period of time as required at the end of the November 6, 1997 letter. The response was mostly toward the stated ground for termination, the October 31, 1997 incident of calling his supervisor a "liar", and screaming that at the supervisor in the supervisor's office while the Plaintiff was engaged in the grievance of the initial memo of concern on the August 21, 1997 incident.

Between October 13, 1997 and November 6, 1997 ADOT had removed the memo of concern, and replaced it with the November 6, 1997 letter of termination.

The Court finds nothing wrong with this procedure. An event occurred between October 13, 1997 and November 6, 1997 that was justifiably of serious concern to ADOT. This event was the October 31, 1997 screaming incident in the supervisor's office. This incident could rationally change the thinking of ADOT from a memo of concern over the first incident to a letter of pretermination leading to dismissal concerning the second incident.

ADOT's supervisor, Joseph O'Neill, indicated that on November 18, 1997 he amended the November 6, 1997 letter with the addition of the August 21, 1997 driving incident as a specific ground for dismissal. The record is somewhat confusing as to the reason why he did this. By November 6, 1997, the supervisor, Mr. O'Neill, would have known that he would have already had his October conversations with the specific individual employees involved as in the driving incident. Therefore, he should have been able to assess the seriousness of the driving incident by the November 6, 1997 letter.

However, the Court finds nothing wrong with the change in the specific ground for termination that occurred in the November 18, 1997 letter putting the Plaintiff/Appellant on notice that the driving incident was now considered serious enough to be a second specific ground for dismissal.

Finally, the Court concludes that ADOT, giving the Plaintiff from approximately 6:00 p.m. on Tuesday, November 18, 1997 (when the November 18, 1997 letter

was hand delivered to the Defendant's home address), to noon on Friday, November 21, 1997, was not a violation of due process pursuant to the Loudermill case. The administrative regulation covering this issue is R2-5-803, which states, "The employee's response shall be made not later than three working days after the employee receives notice of the charges, unless extended in writing by the agency head."

The regulation is written in limiting terms telling the employee that the employee has no more than three days. In this case, if the Court does not count the date of delivery of notice, the three working days would be Wednesday, November 19, 1997; Thursday, November 20, 1997; and Friday, November 21, 1997. The Plaintiff's working day concluded at 3:00 p.m., although at the time of the letter, Plaintiff was not working, but was on administrative leave. One could argue that the ADOT business working day would not conclude until 5:00 p.m. Therefore, the area of concern is whether it was appropriate for ADOT to condition the response to the pre-termination letter at noon on the third working day.

Although it would have been better for ADOT to have allowed to the end of the third working day, the Court does not think the difference between three hours to 3:00 p.m. or five hours to 5:00 p.m. to be significant in this case, and certainly not significant enough to rise to the level of a due process violation.

The Plaintiff had already responded in great detail to the October 31, 1997 incident in his November

10, 1997 letter. Plaintiff would only have had to respond to the driving incident in the time allotted. The Plaintiff had sufficient time to so respond. Even so, the Plaintiff did not respond between noon or 5:00 p.m., on the third working day, November 21, 1997.

Based on the above finding and for the foregoing reasons, the Court concludes that the decision by the Arizona State Personnel Board and ADOT for dismissal, was not arbitrary and capricious; the Court further concludes that errors of law were not made in the process before the Board or at ADOT.

Finally, again based on the above findings, the Court affirms the decision of ADOT and the Personnel Board and denies the appeal of the Plaintiff, thereby leaving in effect the Plaintiff's dismissal from the Arizona Department of Transportation.

Dated this 18 day of June, 1999.

/s/ JONATHAN H. SCHWARTZ (Stamped)
Honorable Jonathan Schwartz
Judge, Maricopa County Super
Court

Original lodged this
18th day of May, 1999
with:
Honorable Jonathan Schwartz
Maricopa County Superior Court

Copy of the foregoing
Mailed this 18th day of
May, 1999 to:
Jay Montoya
3502 West Chambers
Phoenix, Arizona 85041
Robert Sokol
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007
/s/ Craig Mousel
SUNBERG & MOUSEL

ARIZONA STATE PERSONNEL BOARD

JAY MONTOYA,
Appellant,
Vs.
DEPARTMENT OF TRANSPORTATION,
Respondent.

IT IS ORDERED:
The appellant's Objections [to] Findings and Conclusions of Law are denied. The hearing officer's Findings of Fact and Conclusions of Law are adopted as the board's own. The appellant's appeal is denied and the agency action of dismissal is upheld.

/s/ Betty j. Teague
Dr. Betty j. Teague, Vice Chair
Arizona State Personnel Board

RECORDED this 27 day of August, 1998.

Copies of the foregoing mailed this
28 day of August, 1998 to:
Mr. Jay Montoya
C/o Mr. Louis Lujano Representative
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Mr. Jay Montoya
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Ms. Mary Peters, Director
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Mr. Robert Sparks, Hearing Officer
217 East Paradise Lane
Phoenix, Arizona 85022-2517

/s/ Laurie Butler
ARIZONA STATE PERSONNEL BOARD

BEFORE THE STATE PERSONNEL BOARD
IN AND FOR THE STATE OF ARIZONA

/S/ RECEIVED PERSONNEL BOARD JUN 29 1998

Jay Montoya
Appellant,
vs.
Department of Transportation
Respondent

RECOMMENDED DECISION

This matter came on for hearing on February 23, 1998, before Hearing Officer, Robert D. Sparks. The Appellant appeared in person and was represented by A.F.S.C.M.E. Representative, Louis Lujano. The Respondent was represented by Assistant Attorney General, Robert Sokol. The proceedings were closed, and the Exclusionary Rule was invoked. At the hearing Respondent's Exhibits R1 through R-10 and Appellant's Exhibits A-1 through A-4 were accepted into evidence.

After careful review of all the evidence and the transcript, the Hearing Officer makes the followings Findings of Fact, Conclusions of Law, Recommendation, and Reasons In Support of Recommendation.

FINDINGS OF FACTS

1. Appellant was at the time of his dismissal, effective 3:00 p.m. on November 24, 1997, a Fiscal Services Specialist 1, Grade 15. Appellant was a full time permanent employee working at least forty (40)

hours per week. Appellant has been a State employee since December 12, 1991. (See Dismissal letter)

2. The State Personnel Board received an appeal from the Letter of Dismissal on December 2, 1991. (See Dismissal letter)

3. Appellant's duties included activities related to the administration of the equipment-billing program, scheduling and processing billings, and reconciling accounts. All these activities required interaction with other Equipment Services staff. (Exhibits R-1)

4. The Appellant had been disciplined previously for misuse of state property by sending inflammatory email soliciting others to join in a lawsuit against Respondent. He received a 16 hours suspension in December 1996 for this activity. Appellant was also suspended on September 29, 1997 for 80-hours for numerous incidents of continued inappropriate use of E-mail and other matters. (Exhibits R-5, R-6; Tr. p. 79)

5. The 80-hour suspension is the subject matter of separate personnel proceedings. Although the ultimate ruling in that matter has relevancy to resolving Appellant's claim that dismissal is excessive, it is not dispositive or relevant to the issues for which he was dismissed. The alleged misuse of a vehicle on August 27, 1997 and the alleged insubordination by continuing to loudly call his supervisor a liar on October 31, 1997 constitute the basis for the dismissal. (Exhibits R-1, R-6; Tr. p. 80)

6. Appellant and Respondent had a resolution through mediation, negotiation, or settlement of other legal differences, which resulted in Respondent transferring Appellant to his position as a Fiscal Services Specialist 1 for a "fresh start". Appellant erroneously believed he would be placed outside the Department and was disturbed when he realized the clarification. (Tr. pp. 58, 59, 108, 109, 116, 117)

7. Appellant declined to participate in informal social functions with his cowworkers, did not response to greetings such as good morning or goodbye, and exhibited conduct that was interpreted by his coworkers as rude. He consistently verbalized to superiors and coworkers that he refusal to join any "team". He did not want to be a team player. (Tr. pp.23, 30, 38, 61, 125)

8. Ms. P requested relief from the function of supervising Appellant as a stress reduction action. The request was granted although Ms. P was retained as an on-site monitor and facilitator to Appellant work activities. (Tr. pp. 65, 66)

9. On driving path for safety. Two witnesses credibly August 27, 1997, Appellant operated his personal vehicle within a state parking lot in such a manner, and excess of the posted 10 miles per hour posted speed limit, as to cause the pedestrian coworkers to "jump" out of his estimated the Appellant's speed to be approximately 20 miles per hour. (Tr. pp.24, 32, 56, 89)

10. Appellant did not apply his brakes or make any evasive maneuvers during the August 27, 1997 car incident. After the event the Appellant neither stopped nor contacted the pedestrians regarding their safety. The size, shape, and single exit configuration of the parking lot demonstrate the Appellant should have seen the coworker pedestrians. The pedestrians were not engaged in any illegal crossing of the parking lot. (Exhibits R-9; Tr. pp. 24,30,48,49,85)

11. On September 3, 1997, Ms. P., notified her superiors that she had reports that Appellant's actions lead at least one coworker to report concerns for the coworker's safety. (Exhibit R-10)

12. On October 31, 1997, Appellant was involved in a grievance resolution procedure regarding a prior Memo of Concern of October 14, 1997 with his supervisor. The Appellant made requests that were declined by management. Appellant also called his supervisor a "liar". When asked to refrain from such language, Appellant repeated the declaration. Appellant was aggressive n the encounter in his body language and tone and volume. (Exhibits A-1; Tr. 99. 76)

13. Appellant's supervisor initially issued a Memo of Concern regarding the August 27, 1997 incident misidentifying the date as September 27, 1997 on October 14, 1997. (Exhibit R-7) The action was the basis for an internal grievance. In resolving the grievance, the supervisor referenced his action

regarding the Memo of Concern by stating the Memo of Concern was "removed from your personnel file and rescinded. This constitutes the final action on your employee grievance dated October 23, 1997." Emphasis added (Exhibits R-8; Tr. pp. 74,76, 114)

14. The supervisor, Mr. N., received notice of the August 27, 1997 car incident while out of town. His initial understanding of the facts lead him to believe a Memo of Concern was appropriate discipline. Subsequently, he changed his opinion of the gravity of the car incident as well as the relationship to the Appelant's entire work history. The final incident of hostility during the grievance procedure of October 31, 1997 and continuing to call his supervisor a liar after directions to cease prompted an ultimate decision to dismiss. (Exhibits R-8; Tr. pp.78, 95,96)

15. Mr. N's authority to dismiss Appellant is derived from a delegation of authority through his supervisory chain of command. (Exhibits R-3, R-4; Tr. pp. 71)

16. A Notice of Charges dated November 6, 1997, misidentified the occurrence date of the grounds of alleged misconduct, and provided an opportunity to respond to such charges. The charges were subsequently modified and clarified. Another Notice of Charges identifying the initial grounds of alleged misconduct with a proper date and adding the October 31, 1997 incident was issued November 18, 1997. The second corrected Notice of Charges providing another

Opportunity to respond to the charges. (Exhibit R-1; Tr. pp. 68-70)

CONCLUSIONS OF LAW

1. This matter is within the jurisdiction of the State Personnel Board pursuant to Arizona Revised Statutes, section 41-782 (A) and 41-785 because the Appellant was a permanent employee of the State of Arizona. The Hearing Officer has jurisdiction to conduct these proceedings and make a recommendation to such Board pursuant to Arizona Revised Statutes 41-785, subsection (B) and specific appointment authority set forth in a confirmation of appointment memorandum. The Appeal was timely filed.

2. The Appellant was given sufficiently detailed facts regarding the grounds of his dismissal prior to the dismissal and a meaningful opportunity to invoke the discretion of the relevant decision maker before discharge occurred to satisfy the due process requirements of both the Arizona Constitution and the United States Constitution as well as the procedural requirements of Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). The law does not prohibit the Respondent from modifying the basis for dismissal provided, as here, subsequent opportunity to respond to the charges is given.

3. The Respondent's disciplinary actions were progressive. Although Appellant repeatedly insisted at the hearing that the action of rescinding the Memo of

Concern purged the event from any consideration in other disciplinary action and the State was in essence estopped from future consideration of this issue, no law was cited to support this position. The Hearing Officer is unaware of any such bar. With limited exceptions no relevant to these proceedings, estopple will not run against the state under these facts. No evidence of detrimental reliance was shown due to withdrawing the Memo of Concern. The State Personnel rules clearly differentiate between grievance procedures and personnel action to dismiss. Although it was obviously not Appellant's intent to augment the discipline, the Respondent is not precluded from that action. Contrary to Appellant's repeated assertions at the hearing, removing a Memo of Concern vis-à-vis the grievance procedure does not purge the underlying factual events which generated the Respondent's concern.

4. The Personnel Rules do not require an agency head to discharge. Delegation of such authority is permitted.

5. Appellant correctly asserts he has no duty to participate in social interactions with coworkers. However, his actions are relevant to the credibility assessment of the manner he addresses superiors, his mental state in operating the car, and his ability to function within his work unit. Such actions increase in importance when coupled with his admitted displeasure with the resolution in the mediation and

his repeated refusal to join any team or be a team player.

6. Appellant correctly identifies a concern when disciplinary actions are not imposed in a reasonable time. However, what is reasonable depends on the circumstances of each case. The needs to perform other pressing business, conduct a through investigation, and reassess prior actions with or without consultation by counsel, are factors. Assessing all these factors, plus the admitted initial errors of management in properly evaluating the gravity of the incident, demonstrated the response time was not impermissible or unreasonable.

RECOMMENDATION

It is the recommendation of the Hearing Officer after careful review of the evidence and review of the applicable law, that the Appellant's dismissal be upheld.

The Hearing Officer specifically truncated these proceeding concerning the impact the prior 80-hour suspension on the issue concerning the severity of the discipline to avoid another multi-day hearing. The Hearing Officer recommends the Board find the progressive discipline appropriate as well as the severity of the discipline, i.e. dismissal based upon the evidence presented. If, and only if, the Board rules in favor of Appellant in the other pending appeal, a reassessment of the severity of this discipline may be in order depending on the precise findings of the Board.

REASONING IN SUPPORT OF RECOMMENDATION

In resolving the factual disputes, the credibility of the witnesses was especially critical in this proceeding.

Two witnesses testified the Appellant's driving was "menacing". They testified Appellant's driving caused them to literally "jump" for safety. They expressed that without such action on their part they would have been struct by Appellant's car. Neither expressed any doubt the driver was Appellant. The Appellant claimed he not only did not see the coworker but at times that he was not even in the parking lot. The respective versions of the facts are therefore mutual inconsistent.

When questioned on why the coworkers might be "out to get him" and thus lie under oath, Appellant was vague. He acknowledged one witness had no reason to lie and another was somehow forced by his employer. Nothing introduced to support this theory and it is rejected by the Hearing Officer. Appellant admitted he was at work on August 27, 1997 and would have been returning to his car after his normal work shift ended at 3:30 p.m. He provided no alternative as to the events or his participation.

Although denying he yelled at his supervisor, Appellant admitted under cross-examination to repeatedly calling his supervisor a contrary sworn testimony from the witness who supposedly provided the factual for the "lie". He did not specifically address and therefore did not deny he leaned over the desk in a confrontation gesture.

The Appellant's demeanor at the hearing was evasive and initially confrontational. He never specifically offered any credible evidence to challenge the two pedestrians he almost struck with his car. He did characterize his driving as to acknowledge he did not see them. While the hearing officer is sensitive to the informal nature of the proceeding, such a response must be taken at face value in light of the gravity of the potential accident.

The Appellant's driving was at a minimum gross negligence. Operation of a motor vehicle compels one to continually view the anticipated path of the vehicle for potential hazards. The Appellant's claim he did not see the pedestrians is not only not inconsistent but supportive of Respondent's position. The Respondent need no prove an intentional attempt to strike the pedestrians with a car to prevail. Gross negligence and total disregard for pedestrian coworker safety is sufficiently improper conduct to justify discipline.

Social pleasantries are not generally job requirements. However, they support the Respondent's position that Appellant was insubordinate both in his manner and conduct during the October 31, 1997 grievance meeting. The continued insubordination of refusing to refrain from hostile actions during a grievance meeting on prior misconduct, plus repeatedly calling his supervisor a liar, especially in the absence of a through examination of the underlying facts, demonstrates the Respondent has meet its burden of proof.

Here the Appellant's dissatisfaction with his work environment has risen to a level where he

Prevents others from functioning properly. He was and remains so consumed by perceived past injustices that his inattention has placed coworkers at risk of grave bodily harm.

The greater weight of the probative, credible evidence demonstrates the Appellant presents a risk to coworkers and resorts to conduct which is disruptive to the efficient operation of the small unit to which he is assigned. His overall attitude precludes reassignment. He lacks the will to participate in a meaningful interpersonal relationship with coworkers to accomplish communal goals.

Respectfully submitted this
29th day of June, 1998, by:
/s/ Robert D. Sparks
Robert D. Sparks
Hearing Officer

BEFORE THE STATE PERSONNEL BOARD
IN AND FOR THE STATE OF ARIZONA

/s/ RECEIVED PERSONNEL BOARD JUL 8 1998
(stamped)

Jay Montoya
Appellant,

vs.

Arizona Department of Transportation
Respondent

OBJECTIONS TO PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
RECOMMENDATION OF THE HEARING OFFICER

The Appellant hereby files objections to the findings and opinions filed by Hearing Officer (HO), Mr. Robert Sparks, a person reviewing the Appellant's discharge from the Respondent's employment. The Appellant has the right to file objections within 10 days of receiving the HO's report. The Appellant came before the Board in June 1998 concerning the 80-day suspension refer5enced by the HO and in these objections.

The HO is leading the Board after a red herring since there was no case or controversy that was properly brought before the HO. The record clearly shows the history of the process under review by the HO was settled through the grievance process; that the Respondent expunged the Appellant's response to an Intent To Discharge letter; and that the Respondent

thereafter expunged the Appellant's response to an Intent To Discharge letter; and that the Respondent thereafter discharged the Appellant for failing to respond to an amended version of the Intent To Discharge letter. Both the Intent To Discharge and the amended Intent To Discharge letters placed the Appellant in double jeopardy in violation of his constitutional rights, since the graveman in both letters was settled when the Respondent settled the grievance by terminating the grieavance process.

The history before the Board clearly establishes there was no case or controversy that was properly brought before the HO, and therefore the Appellant should be returned to work immediately, and the Appellant should be given back pay for all lost wages as a result of the improper discharge. That history is as follows:

1. On October 14, 1997, the Appellant returned to work after serving an 80-hour suspension without pay. The Appellant found upon his desk a Memorandum of Concern dated October 14, 1997. The memo stated that at 4:05 p.m. on September 27, 1997, the Appellant had allegedly violated a posted rate of speed in an employee parking lot.

2. On October 14, the Appellant immediately grieved the matter pursuant the departmental grievance process. The Appellant's supervisor, Joseph O'Neill, falsely state that Mr. James Macier reported to O'Neill that the Appellant had aimed a vehicle at Mr. Macier in the parking lot. O'Neill told the Appellant that the written warning would stand as written.

3. On October 14, after meeting with O'Neill, the

Appellant discussed the matter with Macier. The Appellant reported what Macier told him to both O'Neill and the Appellant's Equal Employment Opportunity Representative, Mr. James Kimes. The Appellant told O'Neill that O'Neill lied when O'Neill stated Macier reported the matter to O'Neill. Mr. Macier testified before the HO that he had not discussed the matter with O'Neill. O'Neill perjured himself by testifying to the HO that Macier had reported the matter to O'Neill. Mr. Macier stated that he had been approached by his supervisor, Ms. Mary Ann Pikulas, concerning a parking lot incident; and that he had not reported the matter to O'Neill.

4. On October 24, 1997, the Appellant filed a written grievance (**within the 10 day requirement**) concerning the 10/14/97 Memo of Concern pursuant the departmental grievance policy. O'Neill sustained (within the 5 day requirement) the Memo of Concern, refused to allow testimony from Macier into the record, denied the grievance, and handed the Appellant a derogatory performance appraisal dated October 24, 1997.

5. On October 31, 1997, the Appellant filed (within the 5 day requirement) for a Step II grievance review by O'Neill's supervisor, Ms. Mary Peters, the departmental director.

6. On November 6, 1997, O'Neill issued an Intent To Discharge letter and placed the a. the alleged speeding infraction (still being reviewed by his supervisor, Peters); b. previous disciplinary actions (that were then currently being reviewed in administrative hearings before Harold Merkow); a

and c. For stating that O'Neill had lied to the Appellant during the review of the Memo of Concern.

7. On November 10, 1997, the Appellant submitted (within the 10 day requirement) a written response to the November 6, Intent to Discharge.

7. On November 12, 1997, **Peters requested extra time to answer** the Step II grievance concerning the Memo of Concern.

8. On November 14, 1997, the **Appellant agreed to the extension.**

9. November 18, 1997, O'Neill issued a letter advising the Appellant that the Memo of Concern dated October 14 had "been removed from your file and is rescinded. This constitutes the final action on your employee grievance dated October 23, 1997.

10. On November 18, 1997 after 6:00 p.m., in the evening, O'Neill had an amended Intent To Discharge letter delivered to the Appellant at his home that made minor changes to the November 6, 1997 Intent to Discharge letter. The amended letter placed the punitive burden upon the Appellant to "submit a written response ... **to be delivered** to [O'Neill's] office at 2225 s. 22nd Avenue by **November 21, 1997, noon**."

11. From 9:00 a.m. to 4:00 p.m. on November 21, 1997, the Appellant was engaged in hearing before the Board's hearing officer, Harold Merkow. Both O'Neill and the Respondent's representatives, Mr. John Sokol, were also engaged in administrative hearings before Merkow.

12. On November 24, 1997, the Respondent advised the Appellant: "You did not respond to the Pre-

dismissal Notice; therefore, a decision was made to proceed with the dismissal action."

These were the facts before Mr. Robert Sparks.

My able representative, Mr. Louis W. Lujano, American Federation of State County & Municipal Employees, clearly noted to the Hothat by operation of law, the November 18, 1997 action by the Respondent terminated the grievance process, therefore the same issues could not be used to punish the Appellant a second time, in violation of the Appellant's constitutional right against double jeopardy.

It is an unconstitutionally punitive act, as a matter of law, for the Respondent to have demanded that the Appellant respond within one and one-half days of an amendment to an Intent to Discharge letter. The Official grievance process provided the Appellant a 10-day period to respond to the Memo of Concern, and five days to respond at every other stage in the process. The original Intent To Discharge letter dated November 6 gave the Appellant 10-days to respond. There was no evidence or argument before the HO that justified the respondent's act of truncating both the grievance proceeding and intent to discharge proceeding. The record shows the Appellant consistently filed timely in both proceedings. There was no argument or evidence before the HO justifying the Respondent's demand that the Appellant answer within the severely restricted tolling period of 1.5 days. One and one-half days is not a fair period of time to demand a response.

It was capricious for the HO to allow the Respondent to ignore the Appellant's November 10, response, and to thereby provide the authority to discharge the Appellant for allegedly failing to respond within 1.5 days of the amendment to the Intent To Discharge letter dated November 18, 1997.

The HO uses a red herring to sustain the Respondent's retaliatory acts of placing the Appellant on unpaid leave and discharging the Appellant. The HO states that a parking lot incident impacted his review. The Appellant objects to the relevancy of the red herring to the graveman before the HO; the graveman being that the Respondent settled the alleged case or controversy that the HO defines as a parking lot issue.

The Appellant objects to the HO's findings of facts as follows:

1. The HO's findings in paragraph 3, page 2, are wrong: The Appellant was never given the duty of administering the equipment-billing program, or of scheduling or processing billings. The Appellant was given the duties of reconciling accounts, but this did not require interaction with other Equipment Services staff. Testimony from the Respondent's agents prove that the Appellant performed his duties rapidly, professionally, and accurately; resulting in several thousands of dollars of revenue for the division.

2. In paragraph 4, page 2, the HO misrepresents the December 1996, 16-hour suspension issue. That matter was included in a mediated settlement to a federal discrimination complaint with before the

United States District Court. Both the Appellant and the Respondent agreed to dismiss the action with prejudice on all parties. As a point of law, the 16-hour suspension can not be used to justify disciplinary action against the Appellant, and any reference to it should be struck from the record.

3. The HO states, in paragraph 5, page 3, that the Appellant was suspended for 80 hours without pay. That matter was before the Board in June 1998. The HO states the matter "has relevancy to resolving Appellant's claim that dismissal is excessive, it is not dispositive or relevant to the issues for which he was dismissed.

The HO capriciously ignores the relevancy of motive; i.e., why did the Respondent think the alleged August 27 parking lot incident wasnot important enough include in the September 26, 1997 suspension of the Appellant for 80-hours? Why did the Respondent wait one and one half months after the incident to issue a Memo of Concern on October 14, 1997, and why did the Respondent wait another month before deciding to issuean Intent To Discharge on November 6.

The October 14 memo cited the alleged parking lot incident as occurring at 4:05 p.m. on September 27, 1997. The Appellant notified his supervisor, O'Neill, that the Appellant could not have been the alleged speeder because he was home on leave without pay on September 27. The HO capriciously ignores the Respondent's decision to amend the October 14 memo to reflect the alleged negligent parking lot incident that could case severe injury to coworkers was not of such dire concern that it was not included in the original

facts supporting the 80-hour suspension.

The schedule of dates should convince prove that the Respondent violated the official grievance policy and the official progressive disciplinary policy of the agency. Even the HO recognized the Appellant's concern in the matter:

August 27: Two witnesses testify they were in the Respondent's parking lot at approximately 4:05 p.m. on August 27, and that they allegedly saw the Appellant speeding in the lot.

September 3: The Respondent witness, Mary Ann Pikulas, testifies she reported the parking lot incident to her superiors.

September 4: Appellant and his EEO representative have a grievance meeting with the Personnel Director and a representative from the Director's Office concerning his transfer to another agency.

September 5: Appellant is unilaterally placed on administrative leave with pay.

September 26: Appellant is tranfered from leave with pay status to an 80-hour suspension without pay status. The alleged parking lot incident was not included in the Suspension Letter nor was the Appellant apprised of it.

October 14: Appellant returns to work and finds a Memorandum of Concern on his desk concerning a parking lot incident that allegedly occurred on September 27.

October 14: Respondent amends the Memorandum of Concern, citing the alleged incident as occurring on August 27.

Contrary to the HO's statement that there is no relevant connection between the 80-hour suspension and the discharge, the record shows that the Respondent did not deem the alleged parking lot infraction was important enough to include in the September 26 disciplinary document. There was no evidence entered in the record supporting the Respondent's contention that the alleged parking lot incident was grave enough to cause the Appellant's discharge, particularly since the Respondent waited a full month and a half before issuing a Memorandum of Concern on the matter, and another month before deciding the issue was grave enough to warrant a discharge.

4. The Ho misrepresented the facts. A mediation process resulted in a settlement but there is no evidence supporting the HO's contention that the Appellant was transferred to a position "for a fresh start". The record brought before the Board establishes as a matter of law that the Respondent was required to transfer the Appellant to another agency, and that the position that the Appellant was placed in was only a temporary transitional one. The Board should read the mediation agreement and the settlement provisions, both documents were placed before the Board. Since both Harold Merkow and now Rober Sparks, the Board's hearing officers, have both erroneously described the contents of the mediated agreement, the Board should at least read these controlling legal documents.

5. The HO states (paragraph 7, page 3) that the Appellant "did not response to greetings such as good morning or goodbye". The HO gives no example of

what the Appellant's coworkers might interpret as being rude conduct, but affirms that the HO was influenced by the Appellant's refusal to join any "team". The HO falsely states the Appellant "did not want to be a team player".

The record shows that the Appellant was a team player, and that he had been a member of many teams; including service as the Team Facilitator of the Executive Quality Council; a council made up of the Director and Associate Directors of the agency. The record shows the Appellant received excellent performance ratings in Working With People.

The record shows that the Appellant was officially informed by the Department of Administration that the Appellant would not receive any work credit for any voluntary team activities. The record shows the Appellant always held himself out to do any and all work that he was directed to do; and that he did it promptly, efficiently, and with his characteristic professional aptitude and integrity.

The HO is clearly biased, in that he states that the Appellant "did not want to be a team player." The correct statement is: the Appellant has a civil right to receive fair compensation for his work. The record shows that when team work was a direct function of the Appellant's job, the Appellant engaged in the team work fully and with a good attitude. However, where the Appellant was given the option of taking part in voluntary team activities, the Appellant chose not to.

It is capricious for the Respondent to state that team activities are voluntary, and for the Department of Administration to rule that team activities are non-

reviewable relative to the Appellant's pay scale and grade, and then for the Respondent to suspend and discharge the Appellant for refusing to take part in voluntary team activities.

6. In paragraph 8, page 4, the HO states the Appellant's supervisor, Mary Ann Pikulas, requested to be relieved from that role. This was after the Appellant filed several grievances concerning Ms. Pikulas' bigotry and hostility towards the Appellant, issues brought before the Board in June 1998. The HO erroneously states that Pikulas "was retained as an on-site monitor and facilitator to Appellant's work activities."

The record shows that Joseph O'Neill took over supervision of the Appellant, but directed the Appellant to receive his work assignments from James Macier. Macier, like the Appellant, was a Grade 15 employee. The Respondent provided no reason why the Appellant, whom the HO erroneously states was given the duty to "administration of the equipment-billing program", was placed under the purview of Mr. Macier, particularly since Mr. Macier did not functionally have any role over the alleged "administrator of the program".

7. In paragraph 9 and 10, page 4, the HO misrepresents testimony and overlooks the Appellant's criticism of the veracity of the Respondent's agent. There is no doubt that two alleged witnesses testified that they saw the Appellant operating a vehicle in a parking lot on August 27, 1997, and that the Appellant was allegedly speeding "approximately 20 miles per hour" in a 10 miles per hour posted parking lot. The testimony also revealed that the witnesses were in the

parking lot at 4:05 p.m.; and that the Appellant was in the parking lot at 3:35 p.m. Neither witness could describe the Appellant's vehicle, neither one knew if it was large, small, a pickup truck, or a car. Neither could describe any identifying feature of the vehicle. Both testified they just entered the parking lot; having just come from behind the obscuring vegetation at the parking lot entrance. They both testified they saw the Appellant make a 90 degree turn and driving towards them.

The map of the parking lot, with the trees and bushes, was drawn during testimony before the HO. The HO ignored that map after the Respondent offered to enter into evidence a simple layout map of the building and property in the alleged area where the incident took place. The Respondent's map, however, did not include the vegetation which the Appellant had drawn on the original map that the HO did not accept into the record. It is therefore incredible that the HO can falsely state that "The size, shape, and single exit configuration of the parking lot demonstrate the Appellant should have seen the coworker pedestrians." The HO was clearly given evidence that neither witness had been able to correctly identify the Appellant's vehicle as being a low-profile small Toyota car; nor that the height of the Appellant's car was below the roof line of many of the vehicles in the parking lot, and was certainly below the hedge line of the vegetation at the single exit where the alleged witnesses were walking into the parking lot.

The low-profile of the Appellant's car, the irregular shape of the parking lot, the fact that the

witnesses allege that the Appellant just turned a 90 degree corner and then was driving towards them, and that they had just entered the lot from around a large hedge, are all inconsistent with the HO's biased support of the Respondent's position.

8. The HO states, paragraph 11, page 4, that Pikulas notified her superiors, on September 3, 1997 about the concern of an employee concerning an alleged parking lot incident.

The HO fails to reflect on why the matter was not of such grave consequence that Pikulas' supervisors did not include it as a reason to suspend the Appellant for 80-hours without pay, as was done on September 26. The HO fails to reflect on why it took one and one-half months before the Respondent decided the matter was grave enough to warrant a Memorandum of Concern on October 14, 1997; nor on why it took another month before the Respondent decided the matter was so grave as to warrant a letter of Intent To Discharge on November 6, 1997. The record does not show any repetition of any speeding violation by the Appellant between August 27, 1997 and October 14, or November 6. Therefore it is incredible that the HO can justify the Respondent's alleged claim that the speeding issue evolved to such an extent that the Appellant should first receive a Memo of Concern, and then a discharge for the same issue.

The Board should at least publicly reflect on why the Respondent violated its own grievance process and progressive disciplinary process. The Appellant was on leave without pay when the Respondent decided the matter was grave enough to cause his discharge.

Therefore the Board should that the Appellant was discharged, not because of an alleged speeding infraction that allegedly occurred at a time of day when the Appellant was already off the employment premises, but rather that the discharge was retaliation by the Respondent because the Appellant filed a federal discrimination complaint and demanded that the Respondent carry out the mediated terms of settlement of that law suit.

9. The HO, in paragraph 12, page 5, capriciously fails to address why the Appellant called Joseph O'Neill, since to do so would deprive the HO of the ability to fabricate a justification for the Respondent's actions against the Appellant. The HO has proven himself to be first and foremost a defender of the Respondent's prerogrative to manage the Appellant's work place; even if through threat and deceit. The record before the Board, both from the suspension and through the discharge of the Appellant, provide numerous examples of O'Neill's various lies and perjury. Yet the HO chooses not even to address O'Neill's behavior.

The Appellant reported in October 1997 that O'Neill lied when O'Neill stated that Macier had reported the parking lot incident to O'Neill. Macier testified that he did not speak to O'Neill concerning the issue before the Memo of Concern was issued. The Appellant reported in October 1997 that Macier answered Pikulas' questions, after she approached Macier, about an alleged parking lot incident. Pikulas testified she reported the matter to her superiors on September 3. Yet O'Neill still decided to perjure

himself before the HO and stated that he was told of the incident on August 27, and that he spoke to Macier about the parking lot incident before issuing the October 14, Memo of Concern. The conflicting testimony proving O'Neill is a liar and a perjurer before the HO.

10. In paragraph 13, page 5, the HO glosses over the facts behind the Memo of Concern of October 14, and the various findings and grievance processes attesting to the Appellant's fear of reprisal. The HO attempts misleads the Board. The Appellant's due process rights under the Constitution of the United States, state law, and the agency's own grievance and progressive disciplinary policies, were be violated. The HO placed the Appellant in double jeopardy by affirming the Respondent could discipline the Appellant for issues that were already settled in the official grievance process.

11. In paragraph 14, page 5, the HO misrepresents the record and testimony, and does a very poor job of consistency. The HO accepts, without question, the testimony from O'Neill that the parking lot incident was reported to him on August 27, 1997. Yet the HO clearly states in paragraph 11 that Pikulas testified she "notified her superiors" (i.e., Joseph O'Neill) on September 3, 1997; another lie, another perjured fabrication by O'Neill, internally inconsistent, yet clearly expounded by the HO. The HO, after clearly reflecting on this perjured testimony, decided that the Board would fail to catch the inconsistency between his finding in paragraph 11 with his findings in paragraph 14.

12. In paragraph 15, page 6, the HO addresses O'Neill's authority to dismiss the Appellant. The HO fails to report that both the Director's Office and the Personnel Director's office were collaborating with O'Neill to terminate the Appellant. The decision to dismiss the Appellant was a directive originating from the Director's Office of the agency, and is therefore a retaliatory devise that Mary Peters and Jerald Moreland used, in collaboration with O'Neill, to deprive the Appellant of his due process rights, and to place the Appellant in double jeopardy for the purpose of brings about his discharge.

13. In paragraph 16, page 6, the HO capriciously finds that the Appellant was provided "another opportunity to respond to the charges" after he received the November 18, 1997 Intent To Discharge letter at 6:pm at his home. The HO overlooks that a 1.5 day period to respond is patently unfair, and well outside of the standard response requirements of both the agency's grievance procedures and the progressive disciplinary policy. The unfairness is exemplified in the fact that the Respondent required that the Appellant should have filed his response at a time and place that the Respondent knew would be difficult for the Appellant to meet. Finally, the expungement of the Appellant's November 10 response to the original November 6, 1997 Intent To Discharge letter, without review or comment, shows caprice and malice on the Respondent's part.

The Appellant objects to the Hearing Officer's conclusions of law as follows:

A. The HO opinions, in paragraph 2, page 7, that the Appellant "was given ... a meaningful opportunity to invoke the discretion of the relevant decision maker before discharge occurred." The record shows this statement is patently false.

The record shows the Appellant received the November 18 Intent To Discharge letter at home after 6 p.m. on November 18. The record shows the Appellant was preparing for a hearing in a related matter, which was held before Harold Merkow on November 21. The record shows the Respondent knew both about the hearing, and that the Appellant would have to be present at the hearing. The record shows the Respondent directed the Appellant to respond to the November 18 Intent To Discharge letter by "noon" on November 21, and that the response had to be delivered at a location several miles distant from where the Appellant would be engaged in the hearing.

As a matter of law, since the Appellant was given only an arbitrary 1.5 days to respond to the November 18 amendment to the Intent To Discharge, and since the Respondent made it unusually difficult for the Appellant to do so, and since the Respondent immediately terminated the Appellant when the Appellant missed the 1.5 day deadline, the Appellant was not given a "meaningful opportunity to invoke the discretion of the relevant decision maker before the discharge occurred.

The HO opinions that the Respondent, by law, can modify the basis for a discharge. However, the Respondent, by law, cannot simply expunge the

Appellant's response. The Appellant responded timely to the Intent To Discharge letter of November 6. There is no legal justification supporting the Respondent's expungement of that response. The Appellant does not agree that the Respondent had the right to "modify" its basis for the discharge; however, if the HO is correct in that regard, the law certainly does not allow the Respondent to have expunged the Appellant's response to the Intent To Discharge and then to discharge the Appellant for allegedly failing to respond.

B. The HO, in paragraph 3, page 8, stumbles over himself explaining why the Respondent should be able to play fast and loose with the grievance process and the progressive disciplinary process. He cites no law substantiating his argument. He merely asserts that the Respondent is not estopped from placing an employee in double jeopardy by settling an employee's grievance and then reissuing a second disciplinary document concerning the same matter that was settled in the grievance process.

The official grievance procedures are definite in how grievance and issues are to be treated. The HO is clearly biased by asserting the Respondent can do whatever it wants concerning the grievance process. By contract law, implemented through the grievance process, a settlement is either reached when the grievance is terminated, or the Grievant is allowed a higher level of review. As a matter of law, the Appellant was a grievant with a grievance at Step II in the process. Therefore the Appellant's grievance was already before Mary Peters, Joseph O'Neill's superior. Since the Respondent, through O'Neill, terminated that

grievance, the Appellant was deprived of his due process grievance rights particularly since he was placed in double jeopardy which the same issues were used as grounds to further discipline and then to discharge the Appellant.

C. The HO, in paragraph 6, page 8, agrees that the Appellant is not required to take part in voluntary activities. The rest of the HO's assertions in this paragraph are not issues of law, but are rather issues of the HO's biased opinion about alleged facts. The Appellant objects that any inference can be drawn between how the Appellant conducts himself at his job and how he drives his car. The two actions are not related, and the HO is surpassing himself in bias to suggest that the two are related.

D. The HO, in paragraph 6, page 9, capriciously attempts to fabricate his opinion of law to match his false fabrication of the facts. The HO states that the "Appellant correctly identifies a concern when disciplinary actions are not imposed in a reasonable time. However, what is reasonable depends on the circumstances in each case."

The HO ignores the fact that the Appellant responded timely to both the Memorandum of Concern of October 14, and the Intent To Discharge letter of November 6. The HO further misrepresents the issue by ignoring the graveman connection between both disciplinary actions and the alleged parking lot incident on August 27, 1997. The HO fails to justify his reasoning as to why the Respondent's "special circumstances" should allow the Respondent to rescind the October 14 document (a process that allowed the

Appellant five days to respond between grievance stages), to expunge the Appellant's response to the November 6 Intent To Discharge letter (a process that allowed the Appellant 10 days to respond), and yet the HO allows the Respondent to get away with issuing an amendment to the Intent To Discharge on November 18 which required that the Appellant respond within 1.5 days.

The Appellant objects to the Hearing Officer's (HO) reasoning as follows:

A. The HO states two witnesses testified to the parking lot incident, and that the Appellant "claimed he not only did not see the coworker but at times that he was not even in the parking lot. The respective versions of the facts are therefore mutual inconsistent." Page 11)

The record clearly established that the Appellant got off work and left the parking lot at or about 3:35 p.m. on August 27, 1997. Testimony clearly revealed that the alleged two witnesses got off work and were in the parking lot at or about 4:05 p.m. on August 27, 1997.

The HO is clearly misstating facts to support the chase after the red herring. There was never any testimony in the record showing the alleged witnesses were in the parking lot at 3:35 p.m.; 30 minutes before their scheduled quitting time. There was testimony and evidence in the record establishing that the Appellant was not in the parking lot at 4:05 p.m., when the alleged witnesses testified they entered the lot. The HO's reasoning is therefore not only faulty, it is clear

that he is striving to misconstrue facts to support his biased recommendation.

B. The HO states that the Appellant was "questioned on why the coworkers might be 'out to get him' and thus lie under oath, Appellant was vague. ... He provided no alternative explanation to show how both witnesses could be mistaken as to the event or his participation."

The HO is clearly capriciously transferring the onus from the Respondent to the Appellant to prove that the discharge was appropriate. The record clearly establishes, and the HO so states, that the Appellant's "work shift ended at 3:30 p.m." The Appellant should not be required to give an explanation of why the Appellant, who left the parking lot at approximately 3:35 p.m. should have seen the two alleged witnesses who testified they entered the lot at 4:05 p.m.. It is the Respondent's duty to prove that the witnesses were in parking lot during the time the Appellant was. The Respondent did not provide this proof. Secondly, the alleged witnesses could not even describe the color or type of car that was involved in the alleged incident.

C. The HO (pages 11 & 12) stated that the Appellant told O'Neill that O'Neill had lied when fabricating the events that allegedly occurred in the parking lot. However the HO capriciously suggests that "testimony from the witness who supposedly provided the factual for the "lie" does not sustain the Appellant's claim."

The record reveals that James Macier testified that he did not speak to Joseph O'Neill before O'Neill issued the Memorandum of Concern on October 14,

1997. The record clearly shows that the Appellant reported to O'Neill that this was a lie. The record clearly shows that O'Neill, nonetheless, perjured himself by testifying that he talked to Macier before issuing the Memo of Concern.

The HO's refabrication of testimony, particularly when O'Neill is clearly a perjurer, is capricious. A lie is a lie. A liar is a liar. The record stands on its own. Secondly, the HO notes that the previous disciplinary matter that was before the Board has some weight supporting the Appellant's discharge. The record in that previous disciplinary matter clearly established O'Neill varied substantially from the record and the testimony. That record also established that O'Neill perjured himself before the hearing officer Harold Merkow about the testimony given by Pikulas relative to her rating of the Appellant. Since both Macier and Pikulas are both under O'Neill's direct influence, and are presumably friendly witnesses to his case, his clear perjuries before Harold Merkow and Robert Sparks establishes O'Neill is a liar. O'Neill's perjury is glaringly before the Board, and it is incumbent of the Board to recognize the inconsistency between O'Neill's various assertions and testimony from the Respondent's other witnesses.

D. The HO stated, relative to the Appellant (page 12): "He never specifically offered any credible evidence to challenge the two pedestrians he almost struck with his car. He did characterize his driving as to acknowledge he did not see them ... such a response must be taken at face value in light of the gravity of the potential accident."

The HO again attempts to shift the onus from the Respondent to the Appellant to prove that the Appellant did not see the alleged witnesses. The HO capriciously ignored the evidence in the record establishing the odd shape of the parking lot, the low-height profile of the Appellant's car, and the tall shrubbery around the lot.

E. The HO states: "The Appellant's driving was at a minimum gross negligence." The HO gives no supportive argument behind the term "gross negligence". He merely asserts that "The Appellant's claim he did not see the pedestrians is not only not inconsistent but supportive of Respondent's position."

There is no evidence in the record that supports the HO's opinion of inconsistency, and he is capricious in asserting that the Appellant was inconsistent since the Appellant did not falsely confess that he saw the alleged witnesses. The HO does not even seek to explain how the Appellant, who was in and out of the parking lot at 3:35 p.m. as revealed by the record, should have seen the alleged witnesses, who testified they were in the parking lot at 4:05 p.m.

F. The HO states his reasoning is also influenced by the Appellant's "insubordinate"manner and conduct at the October 31, 1997 grievance meeting. The HO fails to state that the alleged conduct was not reported by O'Neill in his Step One official grievance response. The HO does not address the fact that O'Neill has a history of lying to the Appellant, that O'Neill has perjured himself before both Harold Merkow and the HO (Robert Sparks). Lying under oath is a particularly onerous act; yet the HO strove to refrain from

addressing O'Neill's lies and perjury.

The HO states: "refusing to refrain from hostile actions during a grievance meeting on prior misconduct [the October 31 meeting], plus repeatedly calling his supervisor [at the October 31 meeting], especially in the absence of a through examination of the underlying facts, demonstrates the Respondent has meet its burden of proof."

The HO opinion about the October 31, meeting is based entirely from the false fabrications of a liar, Joseph O'Neill. There was no reason to examine underlying facts in order to establish that Joseph O'Neill is a liar. The record clearly shows the Appellant filed a grievance concerning the alleged parking lot incident, and that during that process O'Neill told the Appellant that James Macier had reported and discussed the matter with O'Neill. The record also clearly shows that James Macier testified that he had not discussed the matter with O'Neill before O'Neill issued the Memo of Concern. The record also clearly shows O'Neill therefore perjured himself and stated to the HO, under oath, the James Macier had discussed the matter with O'Neill before O'Neill issued the Memo of Concern. The HO heard O'Neill's testimony in direct contradiction to Macier's testimony. The HO also heard the Appellant testify to several specific examples of O'Neill's lies.

A liar is a liar. It is not fair, and certainly not legal, to discharge the Appellant for having confronting O'Neill when the lies that O'Neill perpetuated in order to discipline and to terminate the Appellant. Any lie is a lie. Not a single instance of deceit or malice on the

part of the Appellant has been alleged. Yet the Appellant has established that O'Neill, Jerald Moreland, Mary Peters, and Eddie Edison have all been involved in lies and deceit to injure the Appellant's reputation, in retaliation for the Appellant's filing a federal discrimination lawsuit.

Liars are liars. It would be a gross perpetration of injustice for the Board to sustain the Appellant's discharge upon testimony from witnesses alleging they were in the employees parking lot at 4:05 p.m., and that they nonetheless saw the Appellant, where the record clearly shows the Appellant left the property a half hour earlier. The manipulation of both the grievance process and the Intent To Discharge process, particularly the manipulation of the due process requirement governing response times that should have provided to the Appellant, establish that the Respondent has discharged the Appellant with malice. If the Board supports the Respondent's agents to bring about the Appellant's discharge, the Board would be party to violating the Appellant's civil rights concerning due process, double jeopardy, and protection from retaliation for having filed a federal discrimination law suit against the Respondent.

G. The HO hypothesizes that the "Appellant's dissatisfaction with his work environment has risen to a level where he prevents others from functioning properly." The HO's opinion is patently biased. The HO ignores 6 years of the Appellant's exemplary service to the Respondent, proven by high performance ratings. The matter before the HO was the November 24, 1997 discharge of the Appellant, allegedly because

the Appellant had failed to answer the November 18 amendment to the November 6 Intent to Discharge, and that the Appellant's November 10 response to the November 6th letter was a sufficient response to the November 18 amendment. Yet the Respondent arbitrarily and capriciously expunged the Appellant's November 10 response and demanded that the Appellant file a second response within 1.5 days of the November 18 amendment to the Intent To Discharge letter. The Board should not sustain the Respondent's action of discharging the Appellant for the reason that it was unreasonable, capricious, unfair, and a violation of the Appellant's civil rights against retaliation. It was patently unfair and illegal for the Responded to manipulate the filing deadline in such a manner that the Appellant's failure to meet a 1.5 day filing deadline resulted in his discharge without a hearing; particularly in light of the fact that O'Neill (the Respondent's agent) and John Sokol (the Respondent's attorney) both knew the Appellant would be in hearings with them before a Personnel Board hearing officer, Harold Merkow, at the time the response was due to be filed at O'Neill's office, located several miles distant.

The Appellant therefore requests that the Board set aside the findings and recommendations of the Hearing Officer, and that the Board return the Appellant to work immediately with backpay.

/s/ Jay Montoya

ARIZONA DEPARTMENT OF TRANSPORTATION
CONFIDENTIAL
EMPLOYEE GREIVANCE

NAME Jay Montoya **JOB TITLE** none
WORK TELEPHONE no phone

Check applicable box(es)
X Work-related
X Personnel Rules Compliance or Non-Compliance
X Complaint of alleged discrimination based on:
X Race
X National Origin
X Other (Specify) For having filed grievances of discrimination. For following them through the U.S. Equal Employment & Opportunity Commission & the U.S. District Court, & for challenging my suspension.

Explain the problem in detail. Include all important information documentation, such as dates, place, etc. Attach additional sheet to explain problem, if necessary. DO NOT use the reverse side of this form. See Employee Problem Solving Procedures for complete instructions.

Attached is enclosure A that I received on 10-14-97 immediately as my first act upon my return from a suspension without pay. I appealed the suspension to the Personnel Board, & claimed I had never even so much as received a written warning concerning an allegation of "hostility" in the work place. I grieve that Joe O'Neill fabricated Enclosure A out of malice. I

asked Joe who reported I was going over 10 m.p.h. Joe said James Macier did. I asked James; and James said he did not tell Joe that I was going over 10 mph. I asked Joe how James could know I was going over 10 mph. Joe said "Whether you were going ten miles an hour or two miles an hour, if you were aiming your car at them, that is improper operation of the vehicle." Joe initialed the quote on Enclosure A on October 14, 1997.

I asked Joe who said I was aiming my car at them. Joe said that was how he interpreted his warning that he had written and given to me. I asked James Macier if he had reported I had "aimed" my car at him, and whether he had "to literally leap" out of my way; the quotes are referencing Joe's statements in Enclosure A. James said that the statement "aimed" never came from him. James said I had come around the blind hairpin curve at the entrance to the employees parking lot at Equipment Services, and that he (James) had simply stepped back.

I grieved the issue in an oral conference with Joe on October 14, and asked if James could be questioned. Joe said, "No"; that Jerry Moreland perhaps could.

What do you suggest be done to correct the problem? I request the written warning dated 10-14-97 be expunged.

I have discussed this matter with my immediate supervisor (with Joe O'Neill on 10/14/97) **in an attempt to resolve the problem prior to initiating this grievance.**

Step I 10-23-97 **(within 10 work days)**

/s/ Jay Montoya

Employee Signature

ARIZONA DEPARTMENT OF TRANSPORTATION
Equipment Services
OFFICE MEMO
October 14, 1997

TO: JAY MONTOYA
Fiscal Services Specialist
FROM: JOSEPH H. O'NEILL
Equipment Administrator
SUBJECT: MEMORANDUM OF CONCERN

At approximately 4:05 p.m. on September 27, 1997, you operated you personal vehicle in the employee parking lot of Equipment Services at 2225 S. 22nd Avenue in a manner that was unsafe and which could potentially have injured your fellow workers. As James Macier and Carol Henry were approaching their own vehicles in the parking lot, you backed out of a parking space and proceeded toward the exit at a high rate of speed, causing them to literally leap out of your way to avoid contact with your automobile.

This type of behavior is unacceptable. The safety of the workplace is paramount, and driving your automobile toward fellow workers in a menacing manner at any speed will not condoned under any circumstances.

In the future, I expect you to adhere to a safe vehicle speed, not to exceed 10 miles per hour. If you do not fully understand what is expected of you or wish to discuss the issue further, please contact me.

/s/ Joseph O'Neill

Jay Montoya
From: Jay Montoya
Sent: Friday, October 24, 1997 2:58 PM
To: Mary Ann Pikulas; Joe O'Neill (Equip Svs)
Cc: Jay Montoya
Subject: Step I Written Grievance

Mary Ann,

Today, I delivered my grievance to you by placing the grievance on your desk. The grievance is dated October 23, 1997. I discussed the matter with my immediate supervisor on October 14, 1997 (When Joe O'Neill assumed the role as my immediate supervisor on October 14, 1997).

Mr. O'Neill informed me that you would again be my supervisor upon your return to work; therefore I am submitting the grievance to you.

The grievance is therefore filed within the 10 days required of the incident that I am grieving, which occurred on October 14, 1997.

Please provide me an opportunity to question James Macier and Carol Henry during the grievance process; Mr. O'Neill refused to allow me to question James during the oral discussion.

Thank you

STEP I RESPONSE

(Three (3) work days after receipt)

EQUIPMENT SECTION
OCT 24 1997
DATA ENTERED
Date received by Step I Authority

Prior to writing the memorandum of concern to you, a copy, with addendum, of which is attached, I considered and reviewed all circumstances and statements made to me. I stand by the memorandum written and will not consider removing it from your file.

/s/ Joseph O'Neill — Oct 31, 1997
Signature of Step I Authority — Date

GRIEVANT'S RESPONSE TO STEP I

(Five (5) work days after receipt)

X Do Not Accept Step I Response
31 OCT 97
Date received by Grievant

Mr. O'Neill refused to allow written testimony or oral testimony from James Macier. Mr. O'Neill's response at Step One differed from oral testimony that I personally heard from Mr. Macier. Mr. Macier agreed that he would submit written testimony to correct Mr. O'Neill's misconstruction of the facts. Mr. James Kimes was also given Mr. Macier's assurance that Mr. Macier would submit written testimony. It is wrong for Mr. O'Neill to refuse me the right to question my alleged accusers, and to receive written testimony from them. I request the right to question Mr. Macier.

Arizona Department of Transportation
OFFICE MEMO

November 12, 1997

TO: Jay Montoya
Equipment Services

FROM: Mary Peters /s/ Mary Peters
Deputy Director

SUBJ: Grievance Extension

I will be out of town from November 14 – 21 for the Annual AASHTO Conference and State Transportation Board Meeting and again November 28 – December 5 on annual leave Therefore, I am requesting a time extension in presenting the response to your grievance until December 8, 1997. This extra time will enable a more thorough investigation of the grievance.

Thank you for you cooperation in this matter.

Cc: ADOT Personnel
Affirmative Action

Jay Montoya
3502 West Chambers
Phoenix AZ 85041

November 14, 1997

Ms. Mary Peters, Deputy Director 100A
Arizona Department of Transportation
PO Box 13588
Phoenix AZ 85002-3588

Subject: Grievance Extension

Dear Ms. Peters:

Today, I received your office memorandum dated November 12, 1997. In response to your memorandum, I hereby agree to a time extension until December 8, 1997.

Thank you
/s/ Jay Montoya
Jay Montoya

I hereby certify that I mailed a copy of this document to Ms. Mary Peters on November 14, 1997, /s/ Jay Montoya.

Arizona Department of Transportation
206 South Seventeenth Avenue . Phoenix Arizona 85007
Jane Dee Hull
Governor

Larry S. Bonine
Director

EQUIPMENT SERVICES
2225 South 22nd Avenue
Phoenix, AZ 85009-6997
(602) 255-7795
(602) 258-5193, Fax

November 18, 1997

Mr. Jay Montoya
3502 West Chambers
Phoenix, AZ 85041

Dear Mr. Montoya:

This is to inform you that the Memorandum of Concern, dated October 14, 1997, has been removed from your file and is rescinded. This constitutes the final action on your employee grievance dated October 21, 1997.

Sincerely,
/s/ Jospeh O'Neill
Joseph H. O'Neill
Equipment Services Administrator

JHO:eo

Arizona Department of Transportation
206 South Seventeenth Avenue . Phoenix Arizona 85007
Jane Dee Hull
Governor
Larry S. Bonine
Director

EQUIPMENT SERVICES
2225 South 22nd Avenue
Phoenix, AZ 85009-6997
(602) 255-7795
(602) 258-5193, Fax

November 18, 1997

Mr. Jay Montoya
3502 West Chambers
Phoenix, AZ 85041

Dear Mr. Montoya:

This letter is official notice of charges of misconduct (as per Department of Administration Rule R2-5-803(A) and to amend the pre-dismissal letter previously issued to you on November 6, 1997. The purpose of this letter is:

1. To provide you with notice of allegations set forth below. A dismissal is being considered based on these allegations, which constitute cause for disciplinary action as outlined in Arizona Revised Statutes Section 41-770 and Arizona Department of Administration Personnel Rule R2-5-501 (Standards of Conduct).
2. To provide you with an opportunity to respond

to the allegations and to present facts which are pertinent to the allegations.

Background: You have been a State Service employee since December 30, 1997, and are currently a Fiscal Services Specialist I, Grade 15. Your responsibilities include, but are not limited to, activities related to the administration of the equipment billing program; scheduling and processing billings; reconciling accounts and producing required reports. As part of your duties, you are required to interact with other Equipment Services Staff in a team environment. Previous to this position, you worked in the Administrative Services Division, Account Payable Unit, in the same classification as your current position.

The specific charges and explanation are:

1. On August 27, 1997, you operated your personal vehicle in the employee parking lot of Equipment Services at 2225 South 22nd Avenue in a manner which was unsafe and which could have potentially injured or slain your fellow workers. As James Macier and Carol Henry were approaching their own vehicles in the parking lot, you backed out of a parking space and proceeded directly toward Mr. Macier and Ms. Henry in a menacing manner and at a high rate of speed causing them to literally leap of your way to avoid contact with your automobile.

2. On October 31, 1997 I asked you to come to my office in order to return you step one grievance concerning a Memorandum of Concern which I had presented you on October 14, 1997. From the time you

entered the office, your attitude was on of hostility and aggression. You asked if you could interrogate the employees who reported the incident referenced in the Memorandum of Concern. I explained that you would be afforded that opportunity in due course, but I didn't want you to interrogate people outside of a formal hearing environment. At that time, your attitude turned from belligerent to aggressive. You began to loudly call me a liar for having documented this incident. After several such verbal attacks, I asked you to refrain from such abuse, at which time you placed your face inches from mine and screamed again, "You are a liar! You are a liar!"

You have been counseled before about your attitude in the work place. It is obvious from your actions in the employee parking lot on August 27, 1997 and in my office on October 31, 1997 that you have not improved your performance or attitude in this area.

In issuing this pre-dismissal notice, consideration has also been given to the following prior disciplinary actions:

1. On December 16, 1996 you received a letter of suspension for 16 hours for misuse of State Property and your work time on November 25, 1996.
2. On September 26, 1997 you received a letter of suspension for 80 hours for your continuing threatening attitude toward your supervisors and co-workers both in the Administrative Services Division and Equipment Services.

As of November 7, 1997 you are being placed on

Administrative leave with pay. This leave will continue until further notice.

While you are on administrative leave, you remain an employee of the State of Arizona and must continue to observe all rules and regulations regarding conduct of State Service employees. You will continue to accrue all rights and benefits as an employee.

During your leave, you must continue to report to me each working day at or near the time you would normally begin and end your work shift. It is not necessary that you physically report for work; however, you must contact me each work day by telephone. Further, you must be available to provide information or services as required. Therefore, you shall notify me of the locations, times and phone numbers where you can be reached during each work day.

You are instructed not to enter the premises of your regular duty areas unless specifically authorized by me.

You are directed to submit a written response to each specific allegation and include appropriate documentation to refute the charges. The response is to be delivered to my office at 2223 S. 22nd Avenue by November 21, 1997, noon.

Sincerely,
/s/ Joseph O'Neill
Joseph H. O'Neill
Equipment Services Administrator

Cc: Employee Personnel File
Attorney General – Transportation

Arizona Department of Transportation
206 South Seventeenth Avenue . Phoenix Arizona 85007
Jane Dee Hull
Governor
Larry S. Bonine
Director

EQUIPMENT SERVICES
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(602) 258-5193, Fax

November 24, 1997

Mr. Jay Montoya
3502 West Chambers
Phoenix, AZ 85041

Dear Mr. Montoya:

This letter is official notice of your dismissal from the Arizona Department of Transportation effective November 24, 1997 at 3:00 p.m.

This action is taken under the authority of Arizona Department of Administration Personnel Rule R2-5-8103.B, for "cause" as outlined in Section 41-770, Arizona Revised Statutes, and Arizona Department of Administration Personnel Rule R2-5-501 (Standards of Conduct).

You have been a State Service employee since December 30, 1991, and are currently a Fiscal Services Specialist I, Grade 15. Your responsibilities include, but are not limited to, activities related to the

administration of the equipment billing program; scheduling and processing billings; reconciling accounts and producing required reports. As part of your duties, you are required to interact with other Equipment Services Staff in a team environment. Previous to this position, you worked in the Administrative Services Division, Accounts Payable Unit, in the same classification as your current position.

On November 18, 1997 you were issued a Pre-dismissal Notice which contained the notice of charges of misconduct. It also advised you that a dismissal was being considered based upon those allegations and provided you with an opportunity to respond to the allegations and present facts which were pertinent to the allegations. **You did not respond to the Pre-dismissal Notice; therefore, a decision was made to proceed with the dismissal action**. (Emphasis added)

The specific charges and explanation are:

1. On August 27, 1997, you operated your personal vehicle in the employee parking lot of Equipment Services at 2225 South 22nd Avenue in a manner which was unsafe and which could have potentially injured or slain your fellow workers. As James Macier and Carol Henry were approaching their own vehicles in the parking lot, you backed out of a parking space and proceeded directly toward Mr. Macier and Ms. Henry in a menacing manner and at a high rate of speed causing them to literally leap out of your way to avoid contact with your automobile.
2. On October 31, 1997 I asked you to come to my office in order to return your step one grievance

Concerning a Memorandum of Concern which I had presented you on October 14, 1997. From the time you entered the office, your attitude was one of hostility and aggression. You asked if you could interrogate the employees who reported the incident referenced in the Memorandum of Concern. I explained that you would be afforded that opportunity in due course, but I didn't want you to interrogate people outside of a formal hearing environment. At that time, your attitude turned from belligerent to aggressive. You began to loudly call me a liar for having documented this incident. After several such verbal attacks, I asked you to refrain from such abuse, at which time you placed your face inches from mine and screamed again, "You are a liar! You are a liar!"

You were counseled before about your attitude in the work place. It was obvious from your actions on August 27, 1997 and October 31, 1997 that you had not improved your performance or attitude in this area.

Your actions constitute a serious violation of Department rules and policies and such misconduct calls for appropriate disciplinary measures. In arriving at the decision that dismissal was the appropriate disciplinary action to take in this matter, consideration was also given to the following facts:

1. On December 16, 1996 you received a letter of suspension for 16 hours for misuse of State Property and your work time.
2. On September 26, 1997 you received a letter of suspension for 80 hours for your continuing threatening attitude toward your supervisors and

co-workers both in the Administrative Services Division and Equipment Services.

Please return all state property immediately so that we can process your final paycheck.

You have the right to appeal this dismissal under A.R.S. 41-785, if you wish. Your appeal should be made in writing to the Personnel Board, 1400 W. Washington, Suite 280, Phoenix, Arizona 85007. You must file your appeal within ten working days from the date of this dismissal, and must state the facts, with specificity upon which your appeal is based along with the action you request of the Personnel Board.

Sincerely,
/s/ Joseph O'Neill
Joseph H. O'Neill
Equipment Services Administrator

cc: Attorney General – Transportation
Employee Personnel file
Personnel Board